Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-731-1993
ANUAR CJ (MALAYA), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
19 DECEMBER 1994

Contract *— Guarantee — Performance bond — On demand performance bond — Whether issuer bank required to pay on demand — Whether payment dependent on contract between plaintiff and defendant — Whether demand must be in any particular form of words*

Civil Procedure *— Injunction — Interlocutory injunction to restrain receipt of moneys under performance bond — Balance of convenience — Whether injunction can be granted if effect is to restrain third party bank which would otherwise not be restrainable*

The appellant, Esso Petroleum Malaysia Inc ('Esso'), agreed with the respondent, Kago Petroliam Sdn Bhd ('Kago'), for the latter to sell and deliver certain construction materials ('the goods') to Esso, from time to time on specified dates which were regarded as being of the essence. It was agreed that Esso would be entitled to deduct a maximum of 10% of the purchase price in respect of any delays in delivery by Kago. However, at Kago's request, Esso paid the full price in exchange for two letters of guarantee ('the performance bonds'), issued by Bank Bumiputra Malaysia Bhd, for the sums of DM466,562 and DM17,640, totalling DM484,202, which was equivalent to the deductions Esso would have been entitled to make. Subsequently, Esso informed Kago that damages for delay amounted to 90% of the total sum of DM484,202 and requested for payment within seven days. Payment was not made and Kago wrote to Esso for particulars justifying the claim. Without replying, Esso made a written demand on the performance bonds addressed to Bank Bumiputra Malaysia Bhd. Kago, however, obtained an ex parte injunction restraining Esso from receiving any part of the moneys under the performance bonds and alleged that: (a) the delays were caused by Esso's refusal to accept the goods; and (b) Esso had not, at the time of acceptance of the delayed goods, indicated its intention to claim damages. Esso's application to the High Court to set aside the injunctions was dismissed and it has appealed.

Held, allowing the appeal:

(1) The performance bonds were stated to be 'unconditional' guarantees and, on a true construction, were pure 'on demand' guarantees. All that was required to trigger them was a demand in writing.

(2) Since the performance bonds were on demand performance bonds, they were independent of any underlying contract between Esso and Kago. Therefore, it was not open to the judge to

inquire into any breach of such underlying contract as he seemed to have done. A

(3) There was nothing to suggest that the demand was not proper. It had complied with the requirement that all claims made under the performance bonds were to be made in writing. No particular form of words is required and if the words used are in apparent conformity with the wording in any particular bond, they are sufficient. B

(4) In this case, although no injunction could have been granted against Bank Bumiputra, Kago was not prevented from applying for an interlocutory injunction against Esso despite the fact that the effect of that was to restrain Bank Bumiputra. However, the balance of convenience lay with Esso as, inter alia, Kago's remedy was in damages and Esso would undoubtedly be able to pay. C

[Bahasa Malaysia summary

D

Perayu, Esso Petroleum Malaysia Inc ('Esso'), telah bersetuju dengan responden, Kago Petroliam Sdn Bhd ('Kago'), supaya Kago menjual and menghantar bahan pembinaan tertentu ('barangan itu') kepada Esso, dari masa ke semasa pada tarikh-tarikh yang tertentu yang dianggap sebagai sangat penting. Telah dipersetujui bahawa Esso akan berhak menolak sebanyak-banyaknya 10% daripada harga belian E untuk sebarang kelengahan dalam penghantaran barangan itu oleh Kago. Bagaimanapun, atas permohonan Kago, Esso telah membayar harga penuh sebagai tukaran bagi dua pucuk surat gerenti ('bon pelaksanaan itu'), yang dikeluarkan oleh Bank Bumiputra Malaysia Bhd, bagi jumlah DM466,562 dan DM17,640, yang berjumlah DM484,202, iaitu jumlah yang sama dengan penolakan yang boleh F dibuat oleh Esso. Kemudiannya, Esso telah memberitahu Kago bahawa ganti rugi bagi kelengahan tersebut berjumlah 90% daripada jumlah DM484,202 dan memohon supaya bayaran dibuat dalam tempoh tujuh hari. Bayaran tidak dibuat dan Kago telah menulis kepada Esso untuk mendapatkan butir-butir yang menjustifikasikan G tuntutan itu. Tanpa menjawab, Esso telah membuat tuntutan bertulis atas bon pelaksanaan itu yang dialamatkan kepada Bank Bumiputra Malaysia Bhd. Kago, bagaimanapun, telah mendapatkan suatu injunksi ex parte untuk menyekat Esso daripada menerima sebarang bahagian daripada wang di bawah bon pelaksanaan itu dan mengata H bahawa: (a) kelengahan tersebut telah diakibatkan oleh keengganan Esso untuk menerima barangan itu; dan (b) pada masa penerimaan barangan yang lambat itu, Esso tidak menunjukkan tujuannya untuk menuntut ganti rugi. Permohonan Esso kepada Mahkamah Tinggi untuk mengetepikan injunksi itu telah ditolak dan ia telah membuat rayuan. I

Diputuskan, membenarkan rayuan itu:

(1) Bon pelaksanaan itu dinyatakan sebagai gerenti 'tanpa syarat' dan, atas pentafsirannya yang benar, merupakan gerenti 'atas

permintaan' yang tulin. Apa yang diperlukan untuk mengaktifkan mereka ialah suatu tuntutan bertulis.

(2) Oleh kerana bon pelaksanaan itu merupakan bon pelaksanaan atas permintaan, ia bebas daripada sebarang kontrak dasar di antara Esso dan Kago. Oleh itu, hakim tidak boleh menyiasat tentang sebarang kemungkiran kontrak dasar itu seperti yang beliau kelihatan telah lakukan.

(3) Tidak ada apa-apa untuk mencadangkan bahawa tuntutan itu tidak wajar. Ia telah mematuhi keperluan bahawa semua tuntutan yang dibuat di bawah bon pelaksanaan itu mesti dibuat secara bertulis. Tiada bentuk perkataan tertentu yang diperlukan dan jika perkataan yang digunakan itu kelihatan sesuai dengan perkataan yang digunakan di dalam sebarang bon tertentu, ianya mencukupi.

(4) Di dalam kes ini, walaupun suatu injunksi tidak boleh diberikan terhadap Bank Bumiputra, Kago tidak dihalang daripada memohon untuk suatu injunksi interlokutori terhadap Esso meskipun kesan injunksi itu ialah untuk menyekat Bank Bumiputra. Bagaimanapun, imbangan kemudahan memihak kepada Esso kerana, antara lain, remedi Kago adalah untuk mendapatkan ganti rugi dan Esso tentunya berkeupayaan untuk membayar.]

Notes

For cases on performance bonds, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1308–1309, 1708.

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725; [1993] Mallal's Digest 181–201.

Cases referred to

American Cynamid v Ethicon [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (refd)

Edward Owen Engineering v Barclays Bank International [1978] QB 159; [1978] 1 All ER 976; [1977] 3 WLR 764 (refd)

Harbottle (RD) (Mercantile) v National Westminster Bank [1978] 1 QB 146; [1977] 2 All ER 862; [1977] 3 WLR 752 (refd)

IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank [1989] 2 Lloyd's Rep 205 (not folld)

IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank [1990] 2 Lloyd's Rep 496; (1991) 51 BLR 1 (CA) (folld)

Legislation referred to

Contracts Act 1950 s 56(3)

Rajendra Navaratnam (*Conrad Young* with him) (*Azman Davidson & Co*) for the appellant.

Shahabudin Shaik Alaudin (*Kamaruddin & Co*) for the respondent.

Peh Swee Chin FCJ (delivering the grounds of judgment of the court): We were not going to write a judgment on this case, but at the conclusion of hearing of it, learned counsel for the appellant seemed to have made a somewhat impassioned plea for it. We have decided to accede to it and we hereby do so.

This case raised the question of what is known as a performance bond in relation to an interlocutory injunction to prevent a call or demand on such performance bond. A brief summary of facts is necessary and is set out below.

The facts not in dispute were that the appellant, Esso Petroleum Malaysia Inc (hereafter called 'the buyer'), had obtained a contract from Petroliam Nasional Bhd to construct some plant called a 'slugcatcher' for which certain pipes and piping materials were required by a contractor employed by the buyer to build the said plant. The buyer then agreed with the respondent, Kago Petroliam Sdn Bhd (hereafter called 'the seller'), for the latter to sell and deliver such pipes and materials (hereafter called 'the said goods'), from time to time on certain specified dates, to the buyer for the use of the said contractor. Such specified dates were regarded by both parties as important, especially for the buyer so that the buyer would be able to comply with the contractual obligations to both the said contractor and also to the said Petroliam Nasional Bhd. Such purchases from time to time of the said goods from the seller by the buyer were initiated and evidenced by separate documentation comprising the details and dates of requirement of the said goods in documents called 'the said local purchase orders' with an appendix of the same terms and conditions of purchase attached in every case to each of these local purchase orders (hereafter called 'local purchase orders'). The said local purchase orders were long documents, and for the purpose of this judgment, it would only be necessary to set out cl 9 of the said terms and conditions of the said local purchase orders:

> Delivery
>
> 9.1 Time is the essence of this purchase order. Seller shall deliver the materials/equipment within the scheduled delivery period specified in this purchase order.
>
> 9.2 If seller fails to deliver the materials/equipment within the scheduled delivery periods specified in this purchase order and EPMI elects not to terminate this purchase order pursuant to art 10.1, it is agreed that as damages to EPMI for such delay, in the absence of legal ground and justification, the value of this purchase order shall be reduced by an amount equal to one percent (1%) of the value of this purchase order for each week or part thereof of delay in the delivery of any or all of the materials/equipment. The maximum amount that can be deducted for liquidated damages is ten percent (10%) of the value of this purchase order. Any liquidated damages due to EPMI as provided in this article shall be deducted from payments due to seller.

In accordance with the said cl 9, whenever the seller delayed in the delivery of the said goods as ordered, deductions were made by the buyer from the payment due to the seller as damages.

A The buyer agreed however, by way of purported indulgence to the seller, to refund a balance of such deductions in the event of 'cost impact' found to be less or none in regard to such damages deducted after such cost impact was ascertained by the buyer.

Such refund being dependent on the ascertainment of such cost B impact, such ascertainment would in turn depend on the completion of the said slugcatcher and the receipt of claims from the said contractor for delay against the buyer. Such ascertainment was found to be more complex than it was anticipated, and the said refund of any balance of such amount of deductions as damages for delay could take time.

C Therefore, at the seller's request, at a meeting between the parties herein, the buyer agreed to release and pay to the seller the total amount of such deductions in exchange for letters of guarantee. A total amount of German Marks, viz DM482,202 was released in exchange for two letters of guarantee (hereafter called 'the performance bonds'), which were issued by Bank Bumiputra Malaysia Bhd and both dated 2 November 1992 for D the sums of DM466,562 and DM17,640, respectively, totalling DM484,202 which was released. The two performance bonds were identical except for the different sums guaranteed and the different guarantee numbers used for identification purpose. It is therefore sufficient to set out below one of the said two performance bonds:

E Bank Bumiputra Malaysia Bhd
BBMB BG No 065–92–106

Date: 2 November 1992

Esso Production Malaysia Inc
F PO Box 10857
50728 Kuala Lumpur

Dear Sirs

Re: Bank guarantee No 065–9Z–106 for DM466,562

G In consideration of Esso Production Malaysia Inc (EPMI) agreeing to release to Perbadanan Ladang-Ladang Tabung Haji Sdn Bhd (PLLTH) the sum of DM466,562 (four hundred sixty six five hundred sixty two only) being the amount of liquidated damages (L/D) presently withheld by EPMI pursuant to several purchase orders made between EPMI and PLLTH, we hereby unconditionally and irrevocably guarantee the payment to EPMI, H the ringgit equivalent of the sum of DM466,562 (four hundred sixty six five hundred sixty two only).

This guarantee shall be effective from 15 October 1992 and shall remain valid, binding and in force for a period of 12 (twelve) months from the effective date. All claims, if any, in respect of or under this guarantee must be made in writing and received by us at any time on or before the I expiry of this guarantee.

This guarantee shall be governed by and construed in all respects in accordance with the laws of Malaysia and the parties hereto hereby submit to the jurisdiction of the courts of Malaysia in all matters connected with our obligations.

In compliance with the Malaysian Exchange Control Act the guarantor shall pay any claim in Malaysian Ringgit equivalent to Deutsche Marks at our current rate on the day the payment on the claim is made.

Yours faithfully
for Bank Bumiputra Malaysia Bhd
Putra World Trade Centre branch
— Sgd —
(Authorized signatories)

It did not seem to be disputed that the buyer on its part, unilaterally, by 1 October 1993, had ascertained the cost impact of the delays and faxed a letter of the same date to the seller stating that it had concluded that damages for the delay had come to 90% of the total sum of DM484,202, the latter sum being the total sum released to the seller by the buyer in exchange for the two performance bonds in question. The buyer requested for payment of the sum representing 90% of the said DM484,202 within seven days. The payment was not so made within such seven days, but instead, on 6 October 1993, the seller wrote to the buyer for all particulars justifying the claim of the said 90%. Without replying, the buyer called on the performance bonds by letter dated 11 October 1993 addressed to Bank Bumiputra Malaysia Bhd. This letter, being a call or demand on the performance bonds, is set out below:

Esso Production Malaysia Inc
PO Box 10857
50728 Kuala Lumpur
Malaysia

11 October 1993

Bank Bumiputra Malaysia Bhd
Putra World Trade Centre
Level 2 Block Podium
Jalan Tun Ismail
50490 Kuala Lumpur

Attention: Cik Normerly Atan

Dear Sir

We refer to the two bank guarantees Nos 065–92–106 (BG 'A') and 065–92–107 (BG 'B') both dated 2 November 1992 for DM466,562 and DM17,640, respectively. The bank guarantees were issued by Bank Bumiputra Malaysia Bhd in favour of Esso Production Malaysia Inc (EPMI) in respect of several purchase orders made between EPMI and Kago Petroleum Sdn Bhd (KAGO).

Pursuant to the bank guarantees, we hereby exercise our rights to claim the whole of the sum of DM17,640 from BG 'B' and the sum of DM418,141.80 from BG 'A' above. The total sum payable by your bank to EPMI is DM435,781.80. We do hereby give you notice of our demand for the immediate payment of the said sum of DM435,781.80.

Please remit the claimed bank guarantee amount of DM435,781.80 in equivalent Ringgit Malaysia by interbank transfer to United Malayan Banking

A Corp Bhd, Jalan Sulaiman, Kuala Lumpur for the credit of Esso Production Malaysia Inc, Account No 0135–10260–1.

We have attached copies of the above bank guarantees for your reference. We will return the originals when our account has been credited.

Should you require any further information, please call Robert Yap at telephone no 2403064.

B

Please acknowledge receipt of our claim by signing and returning the duplicate copy of this demand letter to our bearer.

Very truly yours
— Sgd —
Lam Fook Keong
C Treasurer

The said Bank Bumiputra Malaysia Bhd in response to the call on the performance bonds, wrote to the seller on 12 October 1993 asking the seller to give reasons within seven days why the said bank should not accede to the demand; without replying also, the seller filed the civil suit D concerned herein and obtained an ex parte injunction on 18 October 1993 restraining the buyer, its agents or servants from receiving the said total sum of DM484,202 or any part thereof under the said two performance bonds. On 23 October 1993, the buyer applied to set aside the injunction, etc, and on 15 December 1994, the buyer's application was dismissed with E costs and the injunction was upheld or continued, hence the appeal to the Supreme Court (now Federal Court).

The delays were admitted but the seller made a bare statement that such delays were caused by the buyer's or its agent's refusal to accept the said goods on various grounds which the buyer did not disclose to the seller. However, the seller had delivered all the said goods as ordered (vide F affidavit of Nori Abdul Rahman (undated) at p 70 of the appeal record). The refusal to accept was denied by the buyer (vide affidavit of Puan Sri Junaida bte Mohd Said dated 22 October 1993).

The seller had stated two or possibly three grounds against the said call on the performance bonds, but only two grounds were pressed in G argument. The first ground of the seller was that, such delays were caused by the refusal of the buyer itself to accept the said goods on those occasions in question on various grounds about which the buyer did not tell the seller.

The second ground was a legal one that if the buyer accepted the said H goods delivered later and not on time, the buyer had not, at the time of acceptance of delayed goods, indicated its intention to the seller that the buyer would claim damages. This had obvious reference to s 56(3) of the Contracts Act 1950 which is set out below:

I If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

At the conclusion of the argument, we allowed the appeal of the buyer by setting aside the interlocutory injunction granted by the learned judge. We continue with our reasons therefor.

It is obvious that the word 'bond' is a loose, general term, used also to include a group of documents or legal instruments such as a contract of guarantee, or of indemnity or an undertaking to pay. Any attributive word before the word 'bond' usually refers to the purpose of the bond such as tender bonds, performance bonds, etc. Performance bonds are almost invariably contracts of guarantee and so named presumably to give that extra air of solemnity.

Conventional wisdom has it that in the world of commerce, trustworthiness is a byword for doing business and a performance bond thus plays a crucial role causing more business to be formed and to be transacted. In our view, Kerr J put it very well in *Harbottle v National Westminster Bank* [1978] QB 146 at pp 155–156; [1977] 2 All ER 862 at p 870; [1977] 3 WLR 752 at p 761 by stating:

> It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take.

Lord Denning in *Edward Owen Engineering v Barclays Bank International* [1978] QB 159; [1978] 1 All ER 976; [1977] 3 WLR 764 went so far as to say, 'these performance guarantees are virtually promissory notes payable on demand', and approximated them as letters of credit. Lord Denning's description has of course since come in for a great deal of flak from a good number of people, including academics, justifiably or unjustifiably. We endorse fully, however, the view of an eminent local academic that the said description could have served to cloud the real issue, which is one of contractual interpretation of a performance bond and not of the nature of the transaction — 'Calls on Performance Bonds in Malaysia — the Current Law' by Prof Vincent Powell-Smith [1992] 2 MLJ i.

That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496; (1991) 51 BLR 1. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties' — per Sir Denys Buckley in *IE Contractors* [1990] 2 Lloyd's Rep 496 at p 503; (1991) 51 BLR 1 at p 15.

Looking at the performance bond (bank guarantee No 065–92–106) as set out above, it was stated to be an 'unconditional' guarantee. The only

other thing of note would be the stated requirement that all claims must be made in writing. This performance bond was, on a true construction, a pure on demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, eg a certificate from some nominated independent person like an architect as in some building contracts, etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case, and the seller; at the behest of the latter itself, the performance bond was issued. It was not even worded to make it conditional on a simple declaration by the beneficiary, without proof to its issuer, that the seller had not paid damages to the buyer after the release by the buyer of the sum of DM466,562. In fact, the present performance bond, had it been worded, eg to require any proof of breach by the buyer so as to deserve any payment, then, in such event, its commercial acceptability as a performance bond, would be mostly lost.

Dealing further with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying contract, ie any contract between the buyer and the seller. We thought, therefore, it was not open to his Lordship in the court below to impart into this on demand guarantee, by implication, a requirement to have regard to, or to inquire into any breach of any obligation of such underlying contract, and this seemed to have been done. The next and only other question from the instant performance bonds would be as to what sort of demand it would be as required by its wording.

One, therefore, looked at the letter dated 11 October 1993 as set out above which was supposed to trigger the operation of the instant performance bonds. There was nothing there that could suggest that the demand was not proper and, complying with the simple words there of making a claim by 'a demand in writing', the said letter was sufficiently compliant even though it was verbose.

In the court of the first instance in *IE Contractors* [1989] 2 Lloyd's Rep 205, Leggatt J held that the demand made to Rafidain Bank was invalid, inter alia, for not stating that the demand was 'for damages, etc' as set out in the bond therein, but the Court of Appeal (Staughton and Purchas LJJ and Sir Denys Buckley) in *IE Contractors* [1990] 2 Lloyd's Rep 496; (1991) 51 BLR 1, declined to adopt such a requirement of strict compliance with the words and that notwithstanding that the precise words 'for damages, etc' were not used, a valid demand was made. We wish to associate ourselves with that rather common sense approach. If words are in apparent conformity with the wording in any particular bond, they are sufficient.

On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a

document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence of it.

Learned counsel for the appellant was at some pains to impress on us that the injunction should not have been granted by the lower court in the first place to restrain the buyer from receiving any sum of money under the two performance bonds in question on the ground that *American Cynamid v Ethicon* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 had no application in a situation of restraint of payment on a bank guarantee.

While agreeing that the interlocutory ex parte injunction granted herein in the circumstances of this instant appeal should have been discharged by the learned judge, to say that *American Cynamid* could not be considered in exercising any discretion in granting or withholding such an interlocutory injunction in regard to a bank guarantee was wide off the mark. Except in the case of a few exceptions which did not apply to the instant appeal, *American Cynamid* would apply to all interlocutory injunctions.

We now continue to deal with the circumstances and reasons in the instant appeal that militated against granting the interlocutory injunction.

On the basis of the performance bonds in the instant appeal, for reasons already given above that they were on demand guarantees; then for illustration, should Bank Bumiputra, their issuer, be sued or cited as a party in the instant case, then applying *American Cynamid*, there would have been no serious question for trial in relation to Bank Bumiputra, for the very fact of its being sued or cited as a party must necessarily have been based on a cause of action involving an invasion of a right, threatened or otherwise, by Bank Bumiputra against the seller, ie the plaintiff, which had requested the issue of the performance bonds for the benefit of its beneficiary. No such injunction should have been granted against the issuer of the said performance bonds, ie Bank Bumiputra.

However, in the instant appeal, the interlocutory injunction was granted not against Bank Bumiputra but against the beneficiary of the said performance bonds in an action against the same beneficiary, ie the buyer, so that Bank Bumiputra was in effect similarly restrained, understandably for fear of the contempt proceedings. In our view, further, Bank Bumiputra was not a party to the underlying contract or contracts between the buyer or seller. The right of the seller to the ancillary relief of an interlocutory injunction could arise out of such alleged invasion of the right of the seller ie the plaintiff, by the buyer, ie the defendant, under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.

In considering the seller's application for an interlocutory injunction and applying *American Cynamid* without the need to ascertain the respective strength of the respective cases of the respective parties herein at this stage, the seller had alleged a breach of contracts, ie the buyer's presumably repeated refusal to accept the said goods and the legal failure by the buyer

to notify its intention to the seller of claiming damages when the buyer had accepted the said goods out of time while time had been earlier agreed to be of the essence. The seller had given in turn the answers to all these. These were serious questions for trial and even though they were not that serious, but nonetheless they could not be described as frivolous or vexatious.

Next, the question of balance of convenience would fall for consideration. The first of the principles applicable in regard thereto would be that essentially the remedy of the seller as plaintiff would be in damages and the buyer would undoubtedly be able to pay; the buyer being owned, either directly or ultimately, by one of the world's largest multinational companies. Having sought the release of deductions by the buyer earlier, and offering in exchange the bank guarantees, ie performance bonds, one could infer therefrom some liquidity problem of the seller, and in the absence of anything else, there was some doubt as to whether the seller could financially pay the damages given under a usual undertaking to pay damages on an injunction being granted. While considering other factors in conjunction with what has been stated above, there was a special one among them, ie performance bonds of the present sort were involved here. A performance bond, like a pure on demand guarantee in the instant appeal, has always occupied an important place in the national or international world of commerce. It will be remembered that Lord Diplock in *American Cynamid* had alluded to special factors to be taken into consideration in the particular circumstances of individual cases. We, therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted ex parte and continued inter partes by the learned judge in favour of the seller, should be discharged, hence the appeal was allowed.

For the reasons given, we allowed the appeal with costs here and below, and set aside the interlocutory injunction restraining the making of a call on the performance bonds. The deposit in court was to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim